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Examiner Jean B. Fleurantin	Benjamin S. Withrow
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Appeal Brief	09/276,056

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## NOTES/COMMENTS:

Attached please find the following documents related to the above-referenced application:

- 1) Appeal Brief (in triplicate) (22 pages x 3 = 66 pages)
- 2) Credit Card Payment Form for \$330.00 (1 page)

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Darryl P. Black et al.

Serial No. 09/276,056

Filed: 03/25/1999

For: **FAULT TOLERANCE FOR NETWORK ACCOUNTING ARCHITECTURE**

Examiner: Fleurant, Jean R.

Art Unit: 2172

OFFICIAL

Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

Sir:

The present **APPEAL BRIEF** is filed in triplicate pursuant to 37 C.F.R. § 1.192.

Applicant also encloses a credit card form authorizing payment in the amount of \$330.00 as required by 37 C.F.R. § 1.17(c). If any additional fees are required in association with this appeal brief, the Director is hereby authorized to charge them to Deposit Account 50-1732, and consider this a petition therefor.

**APPEAL BRIEF****(1) REAL PARTY IN INTEREST**

The present application is owned by Nortel Networks Limited of 2351 Boulevard Alfred-Nobel, St. Laurent, Quebec Canada H4S 2A9, which is wholly owned by Nortel Networks Corporation, a Canadian corporation.

**(2) RELATED APPEALS AND INTERFERENCES**

The present appeal is loosely related to appeals in U.S. Patent Application Serial Numbers 09/276,694; 09/276,307 and 09/276,308. Appeal briefs were filed in these cases on February 9, February 11, and February 11, respectively.

The present appeal is also related to prior appeals in related cases 09/276,307 and 09/276,308, for which revised appeal briefs were previously filed on January 30, 2003; and 09/276,207, for which an appeal brief was previously filed on August 30, 2002. While these prior appeals have been remanded or otherwise resolved, Applicant notes them in the interests of full disclosure.

**(3) STATUS OF CLAIMS**

03/25/2004 MAHNE1 00000010 09276056

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Claims 1-23 stand rejected, with the rejection made final on October 21, 2003.

Claims 1-23 are pending and are the subject of the present appeal.

#### **(4) STATUS OF AMENDMENTS**

Applicant attempted to amend claims 2, 7-11, 13, 15, 18, 19, 22, and 23 on January 21, 2004 to correct some typographical errors and grammatical issues. The Advisory Action of February 3, 2004 does not indicate whether these amendments have been entered. Applicant spoke with Examiner Fleurantin on February 5, 2004. Based on the verbal representations of the Examiner, it is Applicant's understanding that the amendments have not been entered. Applicant has filed a petition under 37 C.F.R. § 1.181 to have the amendments entered, but as of this writing, no decision has been made about this petition.

All other amendments have been entered to the best of Applicant's knowledge.

#### **(5) SUMMARY OF THE INVENTION**

The present invention is part of a holistic accounting process which is designed to monitor events within a network so that billing may be achieved thereby. To help assure the integrity and accuracy of the accounting process, the data collectors 52 associated with the network devices 12 collect information about packets that pass to/from/through the network devices. From these packets, the data collectors create accounting records and then transmit the accounting records (see Figure 7 and text at pages 16-20) to the flow aggregation process 60. The data collectors wait for an acknowledgment signal to be sent before discarding the local copies of the accounting records (see text p. 37, lines 15-20). Further, to help guarantee that the accounting records are processed, the data collectors send the accounting records to two flow aggregation processes (see p. 39, line 25-p. 40, line 7). If one flow aggregation process has an error, the accounting records from the other flow aggregation process are directed to the accounting module (*Id.*). This redundancy reduces the likelihood of errors that cause billing opportunities to be foregone. The first and second flow aggregation processes are distinct from one another to help provide the needed redundancy.

#### **(6) ISSUES**

- a. Whether the amendments of January 21, 2004 should have been entered.

b. Whether claims 1-23 are unpatentable under 35 U.S.C. § 103 over Iddon et al. and Bruins et al.

#### **(7) GROUPING OF CLAIMS**

Claims 1, 3-9, and 18-23 stand or fall together.

Claims 2 and 10-17 stand or fall together.

#### **(8) ARGUMENT**

##### **A. Introduction**

The amendments of January 21, 2004 should have been entered because they reduce issues before the Board of Patent Appeals and Interferences. While this amendment should have been entered because the amendment removes issues not raised by the Examiner, the amendment is not critical relative to the claims defining over the rejections raised by the Examiner. With respect to the rejection of record, the Patent Office has not met its burden in proving the motivation to combine the references, especially in light of portions of the reference which teach away from the combination. Even if the Patent Office can satisfy this burden, the combination of references does not teach or suggest sending accounting records to the two flow aggregation processes recited in the claims, nor do the references teach or suggest the acknowledgement signal recited in the claims.

##### **B. Issue: Whether the Amendments of January 21, 2004 Should Have Been Entered**

###### **1. Standard: The Test for Entry of Amendments After Final**

Amendments are not made as a matter of right after a Final Rejection, however, amendments are allowed after a Final Rejection as set forth in 37 C.F.R. § 1.116 and as discussed in MPEP §§ 714.12 and 714.13. In relevant part, 37 C.F.R. § 1.116(b) states “[a]mendments presenting rejected claims in better form for consideration on appeal may be admitted.” The text of MPEP § 714.12 mirrors the language of the regulation, stating “[a]ny amendment that will place the application . . . in better form for appeal may be entered.” Further, the text of MPEP § 714.13 indicates that where an “amendment . . . requires only a cursory review by the examiner, compliance with the requirement of a showing under 37 C.F.R. § 1.116(c) is” not required.

The decision not to enter these amendments is a matter of discretion normally not reviewable by the Board. *In re Berger*, 279 F.3d 975, 984 (Fed. Cir. 2002). Rather, as noted in *Berger*, the normal recourse is by way of petition to the Commissioner under 37 C.F.R. § 1.181. Applicant herein requests reconsideration of this policy.

## **2. The Amendments After Final Should Have Been Entered**

Applicant has concurrently filed a Petition to the Commissioner to enter the Amendments filed on January 21, 2004; however, the filing of such a Petition does not stay the period for filing the Appeal Brief. While Applicant is cognizant of the proper process under which to seek entry of the amendment of January 21, 2004, Applicant herein notes that this process results in the bifurcation of the prosecution. Specifically, the appeal brief is prepared not knowing the outcome of the petition, and thus must address the both possible outcomes of the petition. This is wasteful of the Patent Office's and the Applicant's resources.

Applicant appreciates that the case law indicates that the Board will not consider this issue, and while Applicant does not believe that the Board will change its policy about reviewing decisions not to enter amendments after a final rejection, Applicant herein requests that the Board, of its own initiative, allow entry of the current amendments so that the claims are in better condition for the appeal and subsequent disposition by the Board. If the Board does not allow entry of these amendments and the petition is denied, then additional resources must be expended on remand to have the amendments entered. Applicant's approach would avoid wasting these resources. It makes sense to consolidate this issue with the Board's decision-making authority.

The amendments should be entered because they simplify issues in that they fix typographical and grammatical consistency issues. The typographical errors and grammatical consistency issues corrected by the amendment of January 21, 2004 are of the sort that different Examiners may handle differently. Specifically, some Examiners, such as those involved in the present case, may ignore these errors and issues. Other Examiners may raise an objection to the claims and provide suggestions as to how to overcome the objection. Still other Examiners may feel that the errors and issues rise to the level of making the claims indefinite and might issue a rejection under 35 U.S.C. § 112. To the extent that the Board could conceivably reject the un-amended claims under 35 U.S.C. § 112 or, following the pattern of other Examiners, the Board

could object to the claims, the entry of the amendment before an analysis of the rejections removes issues for the Board to consider and conserves Patent Office resources. In essence, the entry of the amendments helps forestall a possible objection or rejection that the Board may raise. By forestalling the objection or rejection, the amendments remove issues for the Board to consider and help conserve Patent Office resources. Without the amendments, the Board may have to consider the issue as to whether the claims are indefinite or objectionable.

Applicant requests that the Board consider the amended claims rather than use these errors and issues as the basis of a new objection or rejection.

**C. Issue: Whether claims 1-23 are unpatentable under 35 U.S.C. § 103 over Iddon et al. and Bruins et al.**

**1. Standard: The Basic Test for Obviousness Under 35 U.S.C. § 103**

Section 103(a) of the Patent Act provides the statutory basis for an obviousness rejection and reads as follows:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Courts have interpreted 35 U.S.C. § 103(a) as a question of law based on underlying facts. As the Federal Circuit stated:

Obviousness is ultimately a determination of law based on underlying determinations of fact. These underlying factual determinations include: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) the extent of any proffered objective indicia of nonobviousness.

*Monarch Knitting Mach. Corp. v. Sulzer Morat GmBH*, 45 USPQ2d 1977, 1981 (Fed. Cir. 1998) (internal citations omitted).

Once the scope of the prior art is ascertained, the content of the prior art must be properly combined. Initially, the Patent Office must articulate a motivation to combine the references. Further, the Patent Office must support this motivation with objective evidence. *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999). Even if the Patent Office is able to articulate

and support a motivation to combine the references, it is impermissible to pick and chose elements from the art using the application as a template. *In re Fine*, 837 F.3d 1071 (Fed. Cir. 1988). To reconstruct the invention by the selective extraction from the prior art constitutes impermissible hindsight. *In re Gorman*, 933 F.2d 982 (Fed. Cir. 1991). Specifically, the Patent Office is not entitled to ignore portions of the references that may teach away from the combination. *Bausch & Lomb, Inc. v. Barnes-Hind*, 796 F.2d 443, 448 (Fed. Cir. 1986).

After the combination has been made, for a *prima facie* case of obviousness, the combination must still teach or fairly suggest all of the claim elements. *In re Royka*, 490 F.2d 981 (C.C.P.A. 1974); MPEP § 2143.03. If a claim element is lacking after the combination is made, then the combination does not render obvious the claimed invention and the claims are allowable.

## 2. Summary of the References

### a. Iddon et al.

Iddon et al. (hereinafter referred to as "Iddon") discloses a probe 13 that monitors packets that pass therethrough. If the packet is addressed to the probe, the probe responds according to the nature of the packet (see col. 9, lines 2-6). Otherwise, the probe parses the packet and updates tables stored in memory 15 by way of an init function 95 (see col. 8, lines 5-11). When an external application needs information from the tables, the external application sends a request for the information (see col. 6, lines 33-36).

### b. Bruins et al.

Bruins et al. (hereinafter referred to as "Bruins") discloses a router 140 operative to connect a source device 120 with a destination device 130. The router sends flow data packets 220 on communication link 110 (see col. 3, lines 58-62). Filters 230 are coupled to the communication link 110 and receive the flow data packets (see col. 3, lines 63-65). The filters then process the flow data packets, discarding some and retaining others depending on whether the flow data packets meet the filtering criteria (see col. 3, line 66-col. 4, line 3). The filters pass flow data packets to an associated aggregator 240 (see col. 4, lines 52-54). It is possible that a filter 230 may pass some packets to an aggregator 240 and other packets to a secondary filter 230 (see col. 4, lines 17-21). Such secondary filters may be connected to an aggregator (Figure 2). The aggregators aggregate and make records which are stored in databases 251 (see col. 4, lines

56-60). A display application 260 may access the database and use the information therein. A particularly contemplated display application can be used to charge users for network usage.

### 3. The Claims 1-23 Are Not Obvious Over The References Of Record

#### a. The Patent Office Has Not Proven The Motivation To Combine The References

Recent pronouncements from the Federal Circuit impose a rigorous standard upon the Patent Office in establishing *prima facie* obviousness. Specifically, to combat the subtle but powerful attraction of a hindsight-based obviousness analysis, the Federal Circuit in *Dembiczak* indicated that a rigorous application of the requirement for showing a teaching or motivation to combine references was required. *In re Dembiczak*, 175 F.3d at 999. While the suggestion can come from the references, the knowledge of one of ordinary skill in the art, or from the nature of the problem to be solved, the "range of sources available, **does not diminish the requirement for actual evidence.**" *Ibid.* (emphasis added).

In the present case, in the analysis of claims 1, 2, and 18, the Patent Office proposes the combination of Iddon and Bruins without real support for the combination. The Patent Office, in fact, articulates no motivation to combine the two references, much less provides any evidence to support the combination of references. By itself, the failure to articulate a motivation to combine the references, and a further failure to provide actual evidence to support the motivation, is fatal to the assertion of the Patent Office that the claims are obvious.

The Patent Office does, however, discuss a motivation to *modify* the combination, stating "[i]t would have been obvious to a person of ordinary skill in the art at the time the invention was made to *modify the combined teachings of Iddon and Bruins . . .*"<sup>1</sup> In the event that this statement is meant to be the lead in for the basis for the combination, Applicant herein addresses this statement and the following language. The Patent Office opines that "such a modification would allow the teachings of Iddon and Bruins to improve the accuracy and reliability of the fault tolerance for network accounting architecture, and to provide a method and system for monitoring information about network usage . . ."<sup>2</sup> This assertion is accompanied by a citation to col. 2, lines 6-7.

While the citation does not indicate specifically which reference to which it refers, a review of the two references indicates it is likely Bruins was intended. Bruins, col. 2, lines 6-7

<sup>1</sup> Office Action of October 21, 2003, page 6, lines 10-12 (emphasis added).

<sup>2</sup> Office Action of October 21, 2003, page 6, lines 15-18.



states "[a]ccordingly, it would be desirable to provide a method and system for monitoring information about network usage." Applicant proceeds as if the Patent Office had specifically cited to this passage within Bruins. If the Patent Office intended otherwise, Applicant requests clarification and reserves the right to address this other position in the Reply Brief. As is readily apparent, there is nothing in the cited passage that indicates that Bruins contemplates or suggests improving the accuracy and reliability of the fault tolerance for the network accounting architecture. This generalized evidence of a desire to monitor network usage does not equal actual evidence to improve accuracy and reliability. Furthermore, a desire to have a method and system for monitoring information is fully addressed by Bruins, and thus this statement does not suggest or compel a combination of references such as that advanced by the Patent Office. Thus, to this extent, the Patent Office has not supported its motivation to combine the references with the requisite evidence.

The Patent Office goes on to state that the combination thereby provides "a method and system for exporting and using data relating to flows in a flow switching network and responsive to message flow patterns . . ." supporting the statement with a citation to col. 2, lines 17-19. Again, while it is not clear which reference is being cited, the text of Bruins at col. 2, lines 17-19 states "-ing<sup>3</sup> and using data relating to flows in a flow switching network and responsive to message flow patterns." Applicant proceeds as if the Patent Office had specifically cited to this passage within Bruins. If the Patent Office intended otherwise, Applicant requests clarification and reserves the right to address this other position in the Reply Brief. Again, as is readily apparent, there is nothing in the cited passage that teaches or suggests improving the accuracy and reliability of the fault tolerance for the network accounting architecture. This generalized evidence of a desire to have a system for exporting and using data relating to flows in a network does not equal evidence to improve accuracy and reliability. Furthermore, a desire to have a method and system for exporting and using data relating to flows is fully addressed by Bruins, and thus this statement does not suggest or compel a combination of references such as that advanced by the Patent Office. Thus, to this extent, the Patent Office has not supported its motivation to combine the references with the requisite evidence.

In short, the Patent Office's support for the motivation to combine the references does not actually show a suggestion to combine the references with respect to claims 1, 2, or 18.

<sup>3</sup> The "-ing" is the final part of the word "exporting", which begins at line 16.

While the Patent Office separately addresses other claims, the motivation provided in the analysis of these other claims is identical. Specifically, the motivation found at page 7, lines 14-19 of the Office Action of October 21, 2003 is identical to that previously discussed. Likewise, in the "Response to Applicant's Remarks" section (pp. 2-4 of the Office Action of October 21, 2003), the Patent Office repeats the same language. Likewise, in the Advisory Action of January 5, 2004, the Patent Office again repeats the identical language. This language having been addressed above, Applicant does not further address it except to note that the Patent Office has not shown the required actual evidence to support the motivation to combine the references. While the Patent Office has cited passages within Bruins, the passages do not support the fault tolerance motivation, and the other motivations do not suggest a need for the combination.

As further evidence that the motivation advanced by the Patent Office is deficient, or at least has overlooked contrary teachings within the references, Applicant directs the Patent Office's attention to Bruins, col. 1, line 44-col. 2, line 5, wherein Bruins criticizes remote monitoring (RMON). Specifically, Bruins indicates that remote monitoring is subject to a number of drawbacks "including (1) that the number of packets input to and output from the router usually greatly exceeds the capability of the monitoring processor to collect and process information about packets, and (2) that the monitoring processor is only able to collect and process information about packets which pass through that particular link."<sup>4</sup> Iddon, incidentally, describes itself as a remote monitoring system. For example, at Iddon, col. 5, lines 51-57, an exemplary embodiment is described indicating that if "probe 13 is used in an SNMP<sup>5</sup> RMON MIB<sup>6</sup> environment, RMON MIB will determine a minimum set of tables . . . ."<sup>7</sup> As noted above, the Patent Office is not free to ignore portions of the reference which teach away from a combination. *Bausch & Lomb, Inc. v. Barnes-Hind*. Where the reference specifically criticizes a particular methodology, it is unlikely that someone of ordinary skill in the art would be motivated to combine the criticizing reference with a reference whose primary implementation is the criticized subject matter. In this particular case, Bruins criticizes remote monitoring, and Iddon's primary implementation is remote monitoring. Thus, it is unlikely that the two references would be combined.

<sup>4</sup> Bruins, col. 1, lines 54-59.

<sup>5</sup> Standard Network Management Protocol, Iddon, col. 1, lines 66-67.

<sup>6</sup> Management Information Base, Iddon, col. 2, lines 7-8.

<sup>7</sup> Iddon, col. 5, lines 53-55.

On this issue, claims 1-23 stand or fall together. In light of the fact that the motivation is not properly supported for any of the claims, and the references actually teach against such a combination, Applicant requests that the Board reverse the Examiner and instruct the Examiner to allow the claims.

**b. Even If The References May Properly Be Combined, The Combined References Do Not Establish Obviousness**

Even if the Patent Office is deemed to have supported its motivation to combine the references with the requisite actual evidence (a point which Applicant does not concede), the combination of references does not teach or suggest the claimed invention. At least three claim elements are not taught or suggested by the combination of references. First, the combination does not pass accounting records to flow aggregation processors. Second, the combination does not show the accounting records or the collected data going to first and second flow aggregation processes. Third, the combination does not show the acknowledgement signal sent from the flow aggregation processes. The first issue applies only to claims 1, 3-9, and 18-23. To this extent claims 1, 3-9, and 18-23 stand or fall separately from claims 2 and 10-17. As to the other two issues, claims 1-23 stand or fall together. If the Patent Office cannot show each of these elements, the Patent Office has not established *prima facie* obviousness, and the claims for which the element is present are allowable.

**1. The Combination Does Not Pass Accounting Records To Flow Aggregation Processes**

Claims 1 and 18 recite, *inter alia*, that accounting records are produced by data collectors and transmitted to a first and second flow aggregation process. Claim 2 recites broadly that collected data is sent to the first and second flow aggregation processes. As collected data is broader than accounting records, claim 2 has a slightly different scope and the arguments presented under this heading do not apply to claim 2 or its dependents.

The combination of Iddon and Bruins does not pass accounting records to a flow aggregation process. Specifically, when Iddon and Bruins are combined, the combination has Iddon's probe that updates the tables and sends data from the tables to external applications when the external applications make a request. Concurrently operating with Iddon's probe and tables would be Bruins's filters that send flow data packets to Bruins's aggregators. The aggregators then would aggregate the flow data packets and make records that could be seen by a display application. Any other arrangement is a modification to the combination, which has not

been supported with actual evidence as required by *Dembiczak*. Nowhere in this combination is there any teaching or suggestion that accounting records are sent to a flow aggregation process as recited in the independent claims. The Patent Office admits that Iddon does not show sending the accounting records to two flow aggregation processes and relies on Bruins for the teaching that there are multiple aggregators. However, the aggregators of Bruins do not receive the accounting records recited in the claims. Rather, Bruins's aggregators receive flow data packets. Since Bruins's aggregators do not receive accounting records, the combination does not show a claim element and does not establish *prima facie* obviousness.

Evidence that Bruins's aggregators do not receive accounting records can be found throughout Bruins. Specifically, Bruins's "routing device [140] is disposed for receiving a set of packets 150 from the source device 120 and routing them to the destination device 130." (Bruins, col. 2, lines 61-63.) The stream of packets 150 forms a message flow 160 (Bruins, col. 3, lines 7-8), but the term "message flow" is meant to be construed broadly within the scope of Bruins's disclosure (Bruins, col. 3, lines 42-54). As clearly shown in Figure 1 of Bruins, the packets 150, in order to get to destination device 130, must travel over communication link 110. Thus, the output flow data packets 220 of Bruins's Figure 2 must correspond to the packets 150 described earlier in the discussion of Bruins's Figure 1. Filters 230 are coupled to the communication link 110 and receive the flow data packets 220 (Bruins, col. 3, lines 63-66) which are effectively packets 150. As such, it is clear that the filters receive the flow data packets that travel between source device 120 and destination device 130. Thus, the flow data packets that are passed to the aggregators 240 are the data packets that travel between source device 120 and destination device 130. To this extent, the data packets received by the aggregators 240 are not, and cannot be, accounting records. Since the flow data packets are received at the aggregators 240, and the aggregators 240 do not receive accounting records, the combination of references does not show the claim element and the Patent Office has not established *prima facie* obviousness.

The Patent Office is not free to excise the teachings of Bruins. *In re Gorman*; *In re Fine*. Specifically, the Patent Office is not free to ignore the portions of Bruins that teach that flow data packets are received by the aggregators 240. Thus, the Patent Office cannot selectively excise the aggregators from Bruins and insert them into the Iddon system - the references must be combined in their entireties. As explained above, the combination of the references in their

entireties does not show the recited claim elements and thus, the Patent Office has not established *prima facie* obviousness. Applicant requests, in light of the failure of the Patent Office to establish *prima facie* obviousness for claims 1, 3-9, and 18-23, that the Board reverse the Examiner and instruct the Examiner to allow the claims.

### **2. The Combination Does Not Teach Two Flow Aggregation Processes**

Even if the Patent Office articulates a reason to modify the combination to send accounting records to a flow aggregation process and supports this motivation with the requisite actual evidence, it is not readily apparent that the accounting records would be sent to two flow aggregation processes. Specifically, as explained above, Bruins's aggregators 240 are not designed to receive accounting records; the aggregators are designed to receive filtered data packets. It is not clear that the filters 230 send a single flow data packet 220 to multiple aggregators 240. Looking at Figure 2 of Bruins, in those instances where a primary filter 230 (the one on the left or right of the Figure) directs packets to the center filter 230, it is possible that the center filter 230 (also referred to within Bruins as a secondary filter) filters out the incoming data packets from the primary filters such that the center aggregator 240 receives no packets. To the extent that the Patent Office has equated the flow data packets with the collected information/accounting records of the claims and has further equated the aggregators with the flow aggregation processes of the claim, if the flow data packets are not sent to multiple aggregators then there is no disclosure that the collected data/accounting records are sent to multiple flow aggregation processes as recited in the claims.

Since the Patent Office has not shown the collected data/accounting records being sent to two flow aggregation processes, the Patent Office has not established *prima facie* obviousness and the claims are allowable. Applicant requests that the Board reverse the Examiner and instruct the Examiner to allow claims 1-23 on this basis.

### **3. The Combination Does Not Show the Acknowledgement Signal**

Even if the combination teaches that the flow data packets correspond to the collected data/accounting records recited in the claims and that these flow data packets are sent to multiple flow aggregation processes, the combination still does not teach the acknowledgement signal recited in the claims. The Patent Office admits that Iddon does not teach this element.<sup>8</sup> The

<sup>8</sup> Office Action of October 21, 2003, page 6, lines 2-4.

Patent Office then quotes various locations of Bruins to supply this missing element, but makes no effort to identify where the acknowledgement signal is located in Bruins. Applicant has studied the reference, and finds no mention of an acknowledgement signal therein.

The Patent Office does have a confusing sentence stating "and the flow aggregation process that the flow aggregation process received the accounting records before discarding the accounting records sent to the flow aggregation process."<sup>9</sup> For the purposes of a complete response, Applicant proceeds as if this had been stated "and the flow aggregation process [acknowledges] that the flow aggregation process received the accounting records before [the data collector discards] the accounting records sent to the flow aggregation process." If the Patent Office intended some other meaning, Applicant requests clarification and reserves the right to address such a new meaning in the Reply Brief.

While the Patent Office makes the statement that the acknowledgement signal is present in the combination of references, there is no actual evidence of any teaching that this acknowledgement signal is sent. Specifically, there is no evidence that the acknowledgement signal is sent within the references individually, or by the combination of the references. The Patent Office effectively admits that the references in combination do not teach this element when the Patent Office indicates that it would have been obvious to modify the combination to include this feature.<sup>10</sup> The motivation offered by the Patent Office is stated as follows: "[s]uch modification would allow the teachings of Iddon and Bruins to [1] improve the accuracy and reliability of the fault tolerance for network accounting architecture, and [2] to provide a method and system for monitoring information about network usage, (see col. 2, lines 6-7), thereby [3] providing a method and system for exporting and using data relating to flows in a flow switching network and response to message flow patterns, (col. 2, lines 17-19)."<sup>11</sup> Such motivation to combine the references fails for the following reasons.

This motivation has been analyzed above, but not in the context of a motivation to modify the combination to include the acknowledgement signal. Applicant herein addresses the fact that this motivation does not teach or suggest adding an acknowledgement signal to the combination of references. Specifically, clause [1] is not supported by any actual evidence and appears to be the result of hindsight reconstruction. Nowhere is there any evidence that such

<sup>9</sup> Office Action of October 21, 2003, page 6, lines 13-15.

<sup>10</sup> Office Action of October 21, 2003, page 6, lines 10-15.

<sup>11</sup> Office Action of October 21, 2003, page 6, lines 15-19 (numbers in brackets added).

fault tolerance is suggested or necessitated by the references of record. As such, clause [1] cannot form the basis of the motivation to modify the combination. Clause [2] is supported by a citation to Bruins col. 2, lines 6-7, but there is no explanation of how or why a desire to provide a method and system for monitoring information about network usage equates to a suggestion to modify two references to include an acknowledgement signal that the references do not disclose or contemplate. As such, this citation is not persuasive as to the point to add an acknowledgement signal to the combination of references. Clause [3] likewise is supported by a citation to Bruins col. 2, lines 17-19, but there is no explanation of how or why a desire to export and use data relating to flows in a flow switching network and respond to message flow patterns equates to a suggestion to modify two references to include an acknowledgement signal that the references do not disclose or contemplate. To this extent, the motivation offered by the Patent Office does not teach or suggest modifying the combination to include the recited acknowledgement signal. As all the claims recite the acknowledgement signal (directly or by virtue of their dependency on a claim that does recite the acknowledgement signal), and the Patent Office has not shown this element, the Patent Office has not established *prima facie* obviousness for claims 1-23. Applicant therefore requests that the Patent Office reverse the Examiner and instruct the Examiner to allow claims 1-23.

#### D. Conclusion

The Patent Office has improperly prevented an amendment from being entered. This amendment should be entered so that the issues before the Board are simplified. Furthermore, the Patent Office has not established *prima facie* obviousness for a number of reasons. In light of the failure of the Patent Office to establish *prima facie* obviousness, Applicant requests that the Board reverse the Examiner's rejection of claims 1-23 and instruct the Examiner to allow claims 1-23.

Respectfully submitted,

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**(9) APPENDIX**

1. A method of transmitting accounting records in an accounting system that produces information pertaining to network traffic flow comprising:

collecting data from a network device by a data collector associated with the network device and producing accounting records from the data;

transmitting the accounting records to first and second flow aggregation processes, with transmitting further comprising for each flow aggregation process:

storing in the data collector the accounting records;

transmitting the accounting records to the flow aggregation process; and

awaiting an acknowledgment signal from the flow aggregation process that the flow aggregation process received the accounting records before discarding the accounting records sent to the flow aggregation process.

2. A system, including an accounting module, comprising:

a plurality of data collectors disposed in a network, and which collect data pertaining to operation of the network from network devices;

a first flow aggregation process, connected to the plurality of data collectors, wherein the data collectors send the collected data to the first flow aggregation process; and

wherein the data collectors dispose of the collected data only after receiving an acknowledgement that the data has been received with the first flow aggregation process processing the data to generate aggregated records; and

a second flow aggregation process, connected to the data collectors, wherein the data collectors send the collected data to the second flow aggregation process, and dispose of the collected data only after receiving an acknowledgement that the data has been received, with the second flow aggregation process processes the data to generate aggregated records.

2. (Proposed Amendment of January 21, 2004) A system, including an accounting module, comprising:

a plurality of data collectors disposed in a network, and which collect data pertaining to operation of the network from network devices;

a first flow aggregation process, connected to the plurality of data collectors, wherein the data collectors send the collected data to the first flow aggregation process; and

wherein the data collectors dispose of the collected data only after receiving an acknowledgement that the data has been received with the first flow aggregation process processing the data to generate aggregated records; and

a second flow aggregation process, connected to the data collectors, wherein the data collectors send the collected data to the second flow aggregation process, and dispose of the collected data only after receiving an acknowledgement that the data has been received, with the second flow aggregation process ~~processes~~ processing the data to generate aggregated records.

3. The method of claim 1 wherein if the data collector determines that the flow aggregation process is not operating, the method further comprises:

continuing to collect and store accounting records from the network device for future transmission to that flow aggregation process.

4. The method of claim 1 wherein if the data collector does not receive an acknowledgement signal in response to transmitting the records to the flow aggregation process, the method further comprises:

determining an error relating to the first flow aggregation process; and

causing aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

5. The method of claim 1 wherein the data collector produces network accounting records (NARs) from collected data.

6. The method of claim 5 wherein if the transfer is successful, the method further comprises:

removing from a local store of the data collector the locally stored copies of the transferred NARs.

7. The method of claim 5 wherein store and forward capabilities of the flow data collector provide fault tolerance at this accounting process level to ensure reliable data transfer.

7. (Proposed Amendment of January 21, 2004) The method of claim 5 wherein store and forward capabilities of the flow data collector provide fault tolerance at this accounting process level to ensure reliable data transfer.

8. The method of claim 5 wherein flow data collector only transfers NARs when the data collector has determined that the flow aggregation process is available, and the data collector considers the NAR transfer successful upon receipt of an acknowledgement from the flow aggregation process.

8. (Proposed Amendment of January 21, 2004) The method of claim 5 wherein the flow data collector only transfers NARs when the data collector has determined that the flow aggregation process is available, and the data collector considers the NAR transfer successful upon receipt of an acknowledgement from the flow aggregation process.

9. The method of claim 1 further comprises:

determining an error relating to the first flow aggregation process, and causing aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process

9. (Proposed Amendment of January 21, 2004) The method of claim 1 further comprises:

determining an error relating to the first flow aggregation process, and causing aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

10. The system of claim 2 wherein the first and the second flow aggregation process summarizes related information from the received NARs across network device.

10. (Proposed Amendment of January 21, 2004) The system of claim 2 wherein the first and the second flow aggregation ~~process processes~~ summarizes summarize related information from the received NARs across network device.

11. The system of claim 2 further comprising:

an error detection process that detects an error relating to the first flow aggregation process, to cause the aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

11. (Proposed Amendment of January 21, 2004) The system of claim 2 further comprising:

an error detection process that detects an error relating to the first flow aggregation process[,] to cause the aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

12. The system of claim 11 wherein the data collector further comprises:

logic to determine that the flow aggregation process is not operating to cause the data collector to collect and store accounting records from the network device for future transmission to the flow aggregation process.

13. The system of claim 11 wherein the data collector, further comprises:

logic to determine an error relating to the first flow aggregation process; and to cause aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

13. (Proposed Amendment of January 21, 2004) The system of claim 11 wherein the data collector[,] further comprises:

logic to determine an error relating to the first flow aggregation process; and to cause aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

14. The system of claim 11 wherein the data collector produces network accounting records (NARs) from collected data.

15. The system of claim 14 wherein the data collectors further comprise:  
a local store that locally stored copies of the transferred NARs.

15. (Proposed Amendment of January 21, 2004) The system of claim 14 wherein the data collectors ~~collector~~ further ~~comprise~~ comprises:  
a local store that locally ~~stored~~ stores copies of the transferred NARs.

16. The system of claim 11 wherein the data collectors provide store and forward capabilities to provide fault tolerance to the accounting module to ensure reliable data transfer.

17. The system of claim 11 wherein the data collector only transfers NARs when the data collector has determined that the flow aggregation process is available, and the data collector considers the NAR transfer successful upon receipt of an acknowledgement from the flow aggregation process.

18. A computer program product residing on a computer readable medium for transmitting accounting records in an accounting system comprising instructions to cause a computer to:  
collect data associated with a network device and produce accounting records from the data;

transmit the accounting records to first and second aggregation flow processes to produce aggregate reports of the accounting records;

store the accounting records in a local storage; and

await an acknowledgement signal from the first flow aggregation process that the flow aggregation process received the accounting records before discarding the accounting records sent to the first flow aggregation process; and

determine an error relating to the first flow aggregation process to cause the aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

18. (Proposed Amendment of January 21, 2004) A computer program product residing on a computer readable medium for transmitting accounting records in an accounting system comprising instructions to cause a computer to:

collect data associated with a network device and produce accounting records from the data;

transmit the accounting records to first and second aggregation flow processes to produce aggregate reports of the accounting records;

store the accounting records in a local storage; and

await an acknowledgement signal from the first flow aggregation process that the flow aggregation process received the accounting records before discarding the accounting records sent to the first flow aggregation process; and

determine an error relating to the first flow aggregation process to cause the aggregate reports from the second flow aggregation process to be sent to the accounting module in place of the aggregate reports from the first flow aggregation process.

19. The computer program product of claim 18 further comprising instructions to cause a computer to:

determine that one of the flow aggregation processes is not operating;

cause the data collector to continue to collect and store records from the network device for future transmission to that flow aggregation process.

19. (Proposed Amendment of January 21, 2004) The computer program product of claim 18 further comprising instructions to cause a computer to:

determine that one of the flow aggregation processes is not operating; and

cause ~~the~~ a data collector to continue to collect and store records from the network device for future transmission to that flow aggregation process.

20. The computer program product of claim 19 wherein the data collector produces network accounting records (NARs) from collected data.

21. The computer program product of claim 19 further comprises instructions to:  
remove the locally stored copies of the transferred NARs from a local store of the data collector if the transfer is successful.
22. The computer program product of claim 19 wherein store and forward capabilities of the flow data collector provide fault tolerance at accounting process to ensure reliable data transfer.
22. (Proposed Amendment of January 21, 2004) The computer program product of claim 19 wherein store and forward capabilities of the flow data collector provide fault tolerance at the accounting process to ensure reliable data transfer.
23. The computer program product of claim 19 further comprises instructions to:  
determine that aggregation process is available before the data collector transfer NARs, and the data collector considers the NAR transfer is successful upon receipt of an acknowledgement from the aggregation process.
23. (Proposed Amendment of January 21, 2004) The computer program product of claim 19 further comprises instructions to:  
determine that the aggregation process is available before the data collector transfer NARs, and the data collector considers the NAR transfer is to be successful upon receipt of an acknowledgement from the aggregation process.

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